# STATE OF MICHIGAN

# COURT OF APPEALS

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DAVID B. CHAMBERLAIN, SANDRA W. CHAMBERLAIN, NANCY C. VANVELS, JANET C. PETERSON, VIRGINIA C. MAY, GLENN CHAMBERLAIN, JR., and MURIEL G. CHAMBERLAIN,

Plaintiffs-Counter-Defendants-Appellants,

v

POINT NIPIGON ON THE STRAITS RESORT CLUB, JOHN DOE, and MARY DOE,

Defendants-Counter-Plaintiffs-Appellees.

UNPUBLISHED
May 26, 1998

No. 189719
Cheboygan Circuit Court
LC No. 93-003556-CH

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Before: Hood, P.J., and Markman and Talbot JJ.

PER CURIAM.

Following a bench trial, the trial court entered judgment dismissing plaintiffs' claims of fraud and misrepresentation, illegal assessment of shareholder fees, and minority shareholder oppression. In Docket No. 189719, plaintiffs appeal as of right from the dismissal of these claims. The judgment further ordered injunctive relief for plaintiffs on their claim for cleanup of a garbage dump on their property. In Docket No. 189893, defendant[1] appeals as of right from this provision of the judgment. This Court consolidated the parties' appeals. We now affirm in part, vacate in part, and remand for further proceedings.

Docket No. 189719

On appeal, plaintiffs argue that the trial court erred in dismissing their claims of fraud and misrepresentation, illegal assessment of fees and late charges, and minority shareholder oppression. We conclude that the trial court's dismissal of these claims was proper, albeit on different grounds. This Court reviews a trial court's decision in an equitable action under a de novo standard. We review the findings of fact supporting the decision for clear error. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

After reviewing the record, we conclude that plaintiffs are barred from recovery on these claims by the doctrine of laches. Application of the doctrine of laches requires a passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant. *Sedger v Kinnco, Inc*, 177 Mich App 69, 73; 441 NW2d 5 (1988). In determining whether a party is barred from recovery because of laches, each case must be determined on its own particular facts. *Id.*

With respect to plaintiffs' fraud and misrepresentation claim regarding the 400-foot water frontage issue, plaintiffs' proofs indicate that they became aware of the 40-foot shortfall in water frontage as early as 1987 or 1988, whereupon their attorney entered into lengthy negotiations with defendant and a settlement was reached. At that time, plaintiff considered and rejected the option of having their own survey performed. It was not until 1993, when plaintiffs undertook plans to develop a resort on their property adjacent to defendant's property, that they filed the instant lawsuit. With respect to the numerous corporate issues regarding the improper assessment of fees and late charges and minority shareholder oppression, plaintiffs' family relinquished its controlling interest in the resort as a result of the 1978 land contract agreement, and any subsequent changes to corporate bylaws were duly adopted by a vote of the newly constituted majority. Policies regarding voting rights, member fees, late charges, and marketing of lots were applied equally to all members. Notably, plaintiffs abstained from voting when the issue of changing from share vote to unit vote was brought before the membership in 1990. The maxim, "equity aids the vigilant, not those who sleep on their rights," is particularly appropriate here. See *Newton v Security National Bank of Battle Creek*, 324 Mich 344, 357; 37 NW2d 130 (1949); *Burlage v Radio Cab Co*, 321 Mich 319, 325; 32 NW2d 465 (1948); *Henderson v Connolly's Estate*, 294 Mich 1, 18-20; 292 NW 543 (1940); *Douglass v Douglass*, 72 Mich 86, 98-99; 40 NW 177 (1888); *Zoellner v Zoellner*, 46 Mich 511, 515; 9 NW 831 (1881).

Because plaintiffs delayed in bringing this lawsuit and defendant would be prejudiced if this Court were to order the equitable relief sought, we conclude that plaintiffs' claims at issue in this appeal are barred by laches.

We would further note that plaintiffs' minority shareholder oppression claim is time-barred under the applicable period of limitation. A claim brought pursuant to § 489 of the Business Corporation Act, MCL 450.1101 *et seq.*; MSA 21.200(101) *et seq.*, must be commenced within three years of accrual or within two years after the time when the cause of action is (or reasonably should have been) discovered, whichever occurs first. MCL 450.1541a; MSA 21.200(541a);[2] *Baks v Moroun*, 227 Mich App 472, 485-486; ___ NW2d ___ (1998). Here, the events forming the basis of plaintiff's claim of minority shareholder oppression occurred between 1978 and 1990. Plaintiff's complaint was not commenced until May 13, 1993.

Docket No. 189893

In their "dump clean-up" claim, plaintiffs sought reimbursement for the cost of the dump area on their property adjacent to defendant's property. The trial court found a continuing trespass and ordered defendant to clean up the garbage dump. In this appeal, defendant raises several objections to the trial court's order.

Defendant first argues that plaintiffs' claim is barred under the statute of limitations. We disagree. Claims for injury to property are barred if they are not filed within three years of the time of the injury. See MCL 600.5805(8); MSA 27A.5805(8); *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 347-348; 568 NW2d 847 (1997); *Lear v Brighton Twp*, 184 Mich App 605, 608; 459 NW2d 26. The continued presence of the dumped materials on plaintiffs' property, after plaintiff stated that nonbiodegradable items should not be dumped there, constituted a continuing trespass. Cf. *Defnet v City of Detroit*, 327 Mich 254, 258; 41 NW2d 539 (1950); *Rogers v Kent Bd of Co Road Comm'rs*, 319 Mich 661, 666; 30 NW2d 358 (1947). Under the continuing-wrongful-acts doctrine, the period of limitation for a continuing trespass does not run until the wrong has been abated. See *Traver Lakes*, *supra* at 347; *Horvath v Delida*, 213 Mich App 620, 626-628; 540 NW2d 760 (1995). Accordingly, plaintiffs' claim was not barred by MCL 600.5805(8); MSA 27A.5805(8). Defendant also argues that plaintiffs' trespass claim is barred by the doctrine of laches. Again, we disagree. Because defendant does not come into equity with "clean hands" as to the "dumping" issue, application of the doctrine as a complete bar to recovery is inappropriate. See *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 66; 380 NW2d 53 (1985).

Defendant next argues that the evidence was insufficient to support the trial court's finding that defendant, as opposed to some other person or persons, dumped the materials on plaintiffs' land. We disagree. A trespass is the unauthorized intrusion or invasion of the private lands owned by another person. *Murphy v Muskegon Co*, 162 Mich App 609, 618; 413 NW2d 73 (1987). In this case, plaintiffs presented evidence that several items dumped on plaintiffs' property looked like items that had belonged to defendant. From this evidence, the trial court could reasonably infer that those items were

placed on plaintiffs' property by defendant. Accordingly, we decline defendant's request for relief on this claim of error.

Next, defendant argues that trial court erred in granting equitable relief where plaintiff failed to plead a request for equitable relief. This particular contention is without merit as plaintiffs' complaint sought equitable relief in the form of reimbursement for the future cost of the dump cleanup. Cf. *Wayne Co Sheriff v Board of Comm'rs*, 196 Mich App 498, 510; 494 NW2d 14 (1992). Defendant's argument that the trial court erroneously granted declaratory relief to plaintiffs is also without merit, as the trial court did not grant declaratory relief to plaintiffs. Defendant's argument that plaintiffs' failed to support their money damage claim with any proof of the degree of damages is likewise misplaced, as plaintiffs requested reimbursement for an anticipated future expense rather than money damages. Consequently, the situation was not one in which proofs failed to corresponded to the pleadings.

Finally, defendant argues that the injunctive relief ordered by the trial court was not the appropriate remedy under the circumstances. Before issuing a mandatory injunction, a court should consider the relative hardships to the parties, as well as (1) the nature of the interest to be protected, (2) the relative adequacy to the plaintiff of an injunction and of other remedies, (3) any unreasonable delay by the plaintiff in bringing suit, (4) any related misconduct on the part of the plaintiff, (5) the interests of third persons and of the public, and (6) the practicability of framing and enforcing the order or judgment. See *Kratze v Independent Order of Oddfellows*, 442 Mich 136, 142 n 6; 500 NW2d 115 (1993), citing 4 Restatement Torts, 2d, § 936, pp 565-566. On de novo review of the record, we conclude that the trial court's award of injunctive relief was not justified considering the balance of the relative hardships and equities.

The evidence presented in the post-trial hearing regarding the issue of damages indicates that the hardship to defendant of clearing the dump would outweigh the hardship to plaintiffs of maintaining the status quo. Defendant's excavation contractor estimated the total cost of clean up to be between $82,500 and $247,500, and defendant's appraiser determined the fair market value of the 0.8 acre area encompassing the dump to be $1,000, while the entire 10-acre parcel was valued at $4,000. This evidence suggests that the cost of clean up far exceeds the value of the land.[3]

An examination of the character, conduct, and motives of the parties is also relevant. See *Kratze*, *supra* at 146. While the evidence was clear that defendant and its members dumped non-biodegradable items in the pit, the evidence was equally clear that plaintiffs had created and maintained the dump over the course of several decades, including disposing of certain non-biodegradable items themselves, and that they had failed to take sufficient self-help measures (e.g., blocking access, fencing, posting "keep out" signs) and had been dilatory in seeking legal recourse to stop the dumping by defendant and its members. Plaintiffs became aware of non-biodegradable items in the dump as early as the mid-1980s, yet this lawsuit was not filed until 1993.

Given the circumstances of this case, we conclude that the most appropriate remedy would be an award of money damages. Cf. *Kratze*, *supra*. In so holding, we note that plaintiffs' failure to request an award of money damages, or to prove specific money damages, will not preclude an award of money damages where such an award would be the most appropriate remedy. In granting equitable

relief, a court is not bound by the prayer for relief but may fashion a remedy as warranted by the circumstances. *Three Lakes Ass'n v Kessler*, 91 Mich App 371, 377-378; 285 NW2d 300 (1979).

Where a trespass results in an injury to property that is permanent, the general measure of damages is the diminution in the value of the property. *Kratze, supra* at 149. On the other hand, where a trespass results in an injury that is temporary, the proper measure of damages is the cost of restoration of the property to its original condition, if that amount is less than the value of the property before the injury. *Id.* Here, although the nonbiodegradable items in the dump could be cleaned, the trial court erred when it found defendant's continuing trespass to be temporary and abatable. We deem the trespass to be "permanent" because (1) it is likely to continue indefinitely without any clear stopping point, and (2) its removal should not be required by way of an order for injunctive relief. See *id.* at 149-150. Accordingly, the proper measure of damages is the diminution in the value of plaintiff's property attributable to defendant's trespass. The remaining issue of the amount of permanent damages to be paid to plaintiffs must be settled on remand by the trial court, sitting as trier of fact. On remand, the trial court shall determine the amount of permanent damages to be paid to plaintiffs based on the diminution in the value of plaintiff's property attributable to defendant's trespass and enter judgment accordingly.

In Docket No. 189719, dismissal of plaintiffs' claims is affirmed. In Docket No. 189893, the mandatory injunction against defendant to clean up the dump on plaintiffs' property is vacated. The matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] Plaintiffs' complaint included allegations against unidentified defendants "John Doe" and "Mary Doe." However, these claims were neither pursued by plaintiffs nor addressed by the trial court. Accordingly, "defendant" refers only to the Point Nipigon Straits Resort Club.

[2] The Michigan Supreme Court has observed that the predecessor to MCL 450.1541a; MSA 21.200(541a) "merely put in concrete form the doctrine of laches." *Goodspeed v Goodspeed*, 273 Mich 87, 90; 262 NW 742 (1935).

[3] Contrary to plaintiffs' contention, plaintiffs' hardship must be examined from the viewpoint of the present fair market value of the land, rather than its potential future use. Cf. *Kratze, supra* at 151, n 16.